

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner, Department of
Labor and Industry,

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

v.

Michels Pipeline Construction.

The above matter came on for hearing before Administrative Law Judge Eric L. Lipman on May 21, May 22 and June 3, 2009 at the Office of Administrative Hearings in St. Paul, Minnesota. The parties submitted Post-Hearing Memoranda on June 22, 2009. The hearing record closed on June 22, 2009.

Rory H. Foley, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry, Occupational Safety and Health Division (MN-OSHA). Aaron A. Dean, Fabyanske, Westra, Hart & Thomson, P.A., appeared on behalf of Michels Pipeline Construction ("Michels").

STATEMENT OF THE ISSUES

1. Whether Michels Pipeline Construction violated applicable occupational health and safety regulations in the performance of work on certain trenches as described in Citations Number 8389?
2. Whether Michels Pipeline Construction violated applicable occupational health and safety regulations in the performance of work on certain trenches as described in Citations Number 8640?
3. Whether Michels Pipeline Construction is entitled to application of the employee misconduct affirmative defense?

FINDINGS OF FACT

1. Michels Pipeline Construction is engaged in the business of the construction, servicing, and installation of petroleum and high pressure natural gas pipelines. Michels is headquartered in Brownsville, Wisconsin and has regional offices in nine other locations, including Minnesota, and Alberta, Canada.¹

¹ Exhibit J.

2. Michels employs approximately 210 individuals in Minnesota.²

3. Michels uses crews of 7 to 10 individuals who, with heavy equipment, install, construct and repair underground pipelines.³

4. Among Michels' portfolio of work in Minnesota is its work as a pipeline maintenance contractor for CenterPoint Energy. The pipeline maintenance work for CenterPoint Energy is on a "time and materials" basis.⁴

5. Michels has a written work rule that its employees are not to enter an unprotected trench that is 60 inches or deeper unless the trench was properly sloped, benched or braced. This written work rule is contained in both Michels' Safety Manual and its pocket-sized Safety Handbook.⁵

6. All Michels employees are issued a copy of the Safety Manual. Additionally, the pocket-sized Safety Handbooks are made available to all employees.⁶

7. Michels provided safety training regarding proper trench safety practice to its employees during its annual safety training seminars and in "tool box talks" (also known as "tailgate talks") at the job site before the beginning of excavation.⁷

8. Under familiar pipeline construction practice, whenever a trench is dug, the dirt from the excavation is to be placed at a safe distance from the trench so as to prevent the weight of the soil from causing a collapse of the trench walls – and perhaps injuring workmen still inside the trench. The dirt is collected in a "spoil pile."⁸

9. Michels' training frequently touched upon the "2-4-5 Rule." The 2-4-5 rule instructs that: (1) spoil piles from excavations should be at least two feet from the edge of any trench to minimize the risk of a cave in, (2) any trench that is four feet or deeper, must have ladders at a distance of at least every 20 feet; and (3) any trench that is five

² Ex. 61.

³ Ex. 53; Testimony of George Witt.

⁴ See, Ex. 19 and 58; Test. of G. Witt.

⁵ See, e.g., Ex. 11, at 13-14; Ex. 29, at 37-39.

⁶ Exs. 11, 12, and 46; Test. of R. Halfmann, Test. of W. Laxdal and Test. of C. Stenson.

⁷ See, e.g., Exs. 16, 17, 18, 40, and 41.

⁸ Ex. H; Test. of L. Sperling; *compare generally*, Gary Bastian, *Commissioner of Labor and Industry, v. Kenko, Inc.*, OAH Docket No. 9-1901-10044-2 (1996) ("The spoil pile presents two potential hazards (1) when placed at the edge of the trench, the soil pile can spill into the trench and injure employees; and (2) the weight of the soil pile adds additional stress to the wall of the trench which could cause a cave-in. This situation was exacerbated by the vibrations from traffic passing by on the road. The purpose of this regulation is to prevent spills and cave-ins which could cause severe injury or death to an exposed employee") (<http://www.oah.state.mn.us/aljBase/19010044.rp.htm>).

feet or deeper must be sloped, benched, shored or have a trench box in it before an employee enters the trench.⁹

10. Additionally, Michels employees attended federally-mandated operator qualification training (“OQ training”), utility-sponsored safety training and OSHA-sponsored training courses.¹⁰

11. The 2-4-5 rule and proper trench safety practices were among the topics addressed in the OSHA “10 hour course” and the OSHA confined space training.¹¹

12. Michels employees are instructed that they are permitted to refuse to undertake work and to shut down a work site if in their judgment a work safety rule is being violated.¹²

13. Michels home office supervisory employees — including Craig Beckstrand, John Restad and George Witt — conduct unannounced safety audits of sites where Michels’ pipeline work is underway. The purpose of these surprise inspections is to verify and assure compliance with the requirements of applicable safety rules and the provisions of Michels’ Safety Manual.¹³

14. Michels employees acknowledge their awareness that these unannounced safety inspections could occur at any time; that they happen frequently; and that employees are subject to discipline or dismissal if a violation of company work safety rules is discovered during such an inspection.¹⁴

15. MN-OSHA participates in the federal Occupational Safety and Health Administration’s National Emphasis Program. As part of its participation in this program, whenever MN-OSHA safety inspectors observe trench work being performed, and their schedules permit an opportunity to stop at the site, MN-OSHA officials undertake an unannounced inspection of the construction site.¹⁵

16. Among the impromptu inspections conducted by MN-OSHA in 2005 and 2006 were locations where Michels employees were undertaking trench work. Two of these inspections resulted in citations for improper trench protections: MN-OSHA Docket Numbers 8389 and 8640.¹⁶

⁹ Ex. 18; Test. of R. Halfmann, Test. of W. Laxdal and Test. of C. Stenson.

¹⁰ See, Exs. 13, 15, 31, 32, 35, 36, 37 and 40; Testimony of Craig Beckstrand; Test. of G. Witt.

¹¹ Test. of G. Witt.

¹² Test. of R. Halfmann, Test. of W. Laxdal and Test. of C. Stenson.

¹³ See, e.g., Ex. 47, at 2 and 53.

¹⁴ Test. of R. Halfmann, Test. of W. Laxdal and Test. of C. Stenson.

¹⁵ Testimony of Larry Sperling.

¹⁶ Exs. M, N and 57.

MN-OSHA Docket No. 8389 – Citation J8947:

17. On October 17, 2005, employees of Michels were relocating a high pressure natural gas pipeline at a site located near Golden Valley Road and Oak Grove Circle, in Golden Valley, Minnesota.¹⁷

18. Senior Safety Inspector Larry Sperling drove by the Golden Valley Road site and noticed construction workers, a “spoil pile” of dirt and construction activity.¹⁸

19. Mr. Sperling stopped at the excavation site and initiated a trench safety inspection. He located the “competent person” in charge of the excavation site, identified himself as a representative from MN OSHA and initiated an “opening conference” to discuss the purpose of the inspection.¹⁹

20. As part of his inspection, Mr. Sperling measured the trench dimensions, made a quick review of the disturbed soils, took photographs of the site and spoke to Michels employees about the work that was underway.²⁰

21. Mr. Sperling determined that the “L-shaped” trench was 12 feet by 10 feet long, from 3 to 6 feet wide, and up to 4 feet, 10 inches deep. The trench walls were nearly vertical. Sperling likewise concluded that, because the soil was previously disturbed ground, it was Class C type soil.²¹

22. When Mr. Sperling arrived at the Golden Valley Road site, three employees were working inside the trench and neither a ladder nor a trench box was in place inside the trench. Moreover, notwithstanding Sperling’s instructions to a Michels employee to exit the trench, the employee was unable to exit the trench.²²

23. At the closing conference with Michels’ foreman, Rick Halfmann, Sperling discussed the proposed citations with the foreman, and a mutually agreeable abatement date was set. Halfmann conceded to Sperling that there was no trench box on site.²³

24. Rick Halfmann had instructed his crew to follow the work guidelines that he had given earlier in the day regarding trench safety. He did not believe there would be a need for a trench box because the crew had been digging at depths of around 36

¹⁷ Test. of R. Halfmann, Test. of L. Sperling; Test. of G. Witt.

¹⁸ Test. of L. Sperling.

¹⁹ Test. of L. Sperling.

²⁰ *Id.*

²¹ Test. of L. Sperling; *see also*, Ex. A (29 C.F.R. § 1926, Subpart P, Appendix A).

²² Ex. H at 6, 13 and 14; Test. of L. Sperling.

²³ Test. of L. Sperling.

inches that day and sloping had been used on other areas of the project where the trench was 60 inches or deeper.²⁴

25. At the point at which the excavation reached the front of the Oak Grove Church, the depth of the trench was greater than 60 inches.²⁵

26. David Bader, a heavy-machine operator with Michels, received written discipline for his entry into an unprotected trench.²⁶

27. Mr. Halfmann received Michels' safety training and acknowledged that the "2-4-5 Rule" was communicated to him orally and in writing.²⁷

28. Because his subordinates had entered an unprotected trench that was greater than 60 inches in depth, Mr. Halfmann received written discipline from Michels.²⁸

29. On October 27, 2005, Mr. Sperling issued his Inspection Report and Worksheet, Exhibits B and C, which recommended issuance of the following three Serious citations:

Citation 1, Item 1 - Serious citation - 29 C.F.R. § 1926.651 (c)(2) for failure to provide a means of egress in a trench that was more than 4 feet deep. The unadjusted penalty for this violation was \$3,000.

After crediting Michels for its good faith, ongoing safety programs and prior safety record, the proposed adjusted penalty for Citation 1, Item 1 was \$2,100.

Citation 1, Item 2 - Serious citation - 29 C.F.R. § 1926.651(k)(2) for failure of the competent person on-site to ensure that excavations that employees worked in met the standards and for the competent person's failure to remove employees from the excavation when the protective systems were not in place. The unadjusted penalty for this violation was \$4,000.

After crediting Michels for its good faith, ongoing safety programs and prior safety record, the proposed adjusted penalty Citation 1, Item 2 was \$2,800.

Citation 1, Item 3 - Serious citation - 29 C.F.R. § 1926.652 (a)(1) for exposing employees to an unprotected excavation by allowing them to

²⁴ Test. of R. Halfmann.

²⁵ Ex. H at 4, 14, 20 and 24; Test. of L. Sperling.

²⁶ See, Ex. 50 at 1.

²⁷ Ex. 18.

²⁸ Exs. 49 and 50.

work in two unprotected trenches approximately fifty feet apart. The unadjusted penalty for this violation was \$5,000.

After crediting Michels for its good faith, ongoing safety programs and prior safety record, the proposed adjusted penalty Citation 1, Item 3 was \$3,500.²⁹

30. On November 3, 2005, MN-OSHA issued the Citations and Notification of Penalty.³⁰

31. On November 21, 2005, Michels filed a Notice of Contest.³¹

32. On February 17, 2006, MN-OSHA filed and served a Summons and Notice to Michels.³²

33. On February 21, 2006, Michels answered MN-OSHA's Complaint, asserting in part that the violations were due to unpreventable employee misconduct.³³

MN-OSHA Docket No. 8640 – Citation U7336:

34. On June 13, 2006, Michels' employees were repairing a pipeline near East Columbia Parkway and Northeast Architect Street in Minneapolis, Minnesota.³⁴

35. There were two trenches at this site – both of which were on Columbia Parkway; an "eastern" trench and a "western" trench.³⁵

36. Senior Safety Inspector Gary Anderson drove by the site while en route to his office from another inspection. Anderson observed a spoil pile, construction equipment and trench activity. As part of the National Emphasis Program, he stopped to undertake an impromptu inspection of the work site.³⁶

37. Anderson located the "competent person" in charge of the excavation site, Mr. Laxdal, identified himself as a representative from MN-OSHA and initiated an "opening conference" to discuss the purpose of the inspection.³⁷

²⁹ Ex. C; Test. of L. Sperling.

³⁰ Ex. M.

³¹ Ex. R.

³² *Id.*

³³ Ex. 6. Further, on February 24, 2006, Michels filed an Amended Answer.

³⁴ Test. of Gary Anderson.

³⁵ *Id.*; Ex. I.

³⁶ Test. of G. Anderson.

³⁷ *Id.*

38. Believing the pipeline repair work in the eastern-most trench to be completed, Corey Stenson, a backhoe operator with Michels, began to fill in this trench with soil. Noticing that a metal locating wire was not properly attached to the polyvinyl chloride (PVC) pipe in the trench, Stenson stopped the backfilling operation, exited the cab of the backhoe and jumped into the trench. Stenson was fastening this wire to the vinyl pipe when Inspector Anderson approached the eastern trench.³⁸

39. Earlier in the day, a trench box was on site, and in use, while repairs to the pipeline were underway.³⁹

40. Mr. Stenson did not apprise any of his co-workers that he was going to return to the trench for additional work before entering the trench.⁴⁰

41. When the locating wire was later fastened to the vinyl pipe, Stenson exited the trench by walking atop that portion of the soil fill that he had earlier placed into the trench.⁴¹

42. Mr. Anderson measured the eastern-most trench and determined that it was 6 feet deep; 13 feet, 9 inches long; and 6 feet, 6 inches wide. The trench walls were vertical.⁴²

43. Mr. Anderson measured the western-most trench and found that it was less than 5 feet deep – and therefore too shallow to prompt the contractor to undertake sloping, shoring or trench box safety measures.⁴³

44. Because the trench soil was located in a roadway with an existing high pressure natural gas line and utility wires, the soil was “previously disturbed,” and thus was classified as Type C soil.⁴⁴

45. Messrs. Laxdal and Stenson received Michels’ safety training and acknowledge that the “2-4-5 Rule” was communicated to them orally and in writing.⁴⁵

46. Mr. Stenson received written discipline for his entering an unprotected trench that was greater than 60 inches in depth. Stenson was required to attend an

³⁸ Testimony of Corey Stenson.

³⁹ Test. of C. Stenson; Test. of W. Laxdal.

⁴⁰ Test. of C. Stenson; Test. of W. Laxdal.

⁴¹ Test. of C. Stenson.

⁴² Test. of G. Anderson; Ex. I; *see also*, Test. of C. Stenson.

⁴³ Test. of G. Anderson; Ex. I,

⁴⁴ Test. of G. Anderson; Ex. I; *see also*, Test. of C. Stenson.

⁴⁵ *See*, Ex. 18.

eight-hour trench safety training session, without pay, as a condition of continued employment. Likewise, Wyatt Laxdal, the job site foreman, received written discipline and was required to attend an eight hour trench safety training session, without pay, as a condition of continued employment.⁴⁶

47. Ensuring Stenson's and Laxdal's attendance at the employer-selected course, Michels Safety Director George Witt accompanied the men to the eight-hour training session.⁴⁷

48. On June 16, 2006, Anderson conducted a closing conference with the Michels' foreman and it's Safety Director, George Witt. At the closing conference, Anderson discussed the proposed citations with the foreman and Safety Director, and a mutually agreeable abatement date was set. On July 5, 2006, Anderson completed his Inspection Report and Worksheet, Exhibits D and E, that proposed the following citations:

Citation 1, Item 1 - Serious citation - 29 C.F.R. § 1926.651 (c)(2) for failure to provide a ladder or another means of access and/or egress in an excavation that was 6 feet deep with nearly vertical walls.

The unadjusted penalty for this violation was \$2,500. After crediting Michels for its good faith, ongoing safety programs and prior safety record the proposed adjusted penalty for Citation 1, Item 1 was \$1,500.

Citation 1, Item 2 - Serious citation - 29 C.F.R. § 1926.651 (k)(2) for Respondent's employees' failure to perform the function of a competent person at the jobsite, to take corrective action at the site, and to remove employees from the unprotected excavation.

The unadjusted penalty for this violation is \$2,000. After crediting Michels for its good faith, ongoing safety programs and prior safety record the proposed adjusted penalty for Citation 1, Item 2 was \$1,200.

Citation 1, Item 3 - Serious citation - 29 C.F.R. § 1926.652 (a)(1) for Respondent's failure to utilize an adequate protective system for employees working in an excavation that was 6 feet deep, 13 feet 9 inches long, and 6 feet 6 inches wide, with a bottom width of approximately 6 feet 6 inches and Type B soil.

The unadjusted penalty for this violation is \$2,500. After crediting Michels for its good faith, ongoing safety programs and prior safety record the proposed adjusted penalty for Citation 1, Item 3 was \$1,500.⁴⁸

⁴⁶ Exs. 21, 22, 23 and 24.

⁴⁷ Test. of G. Witt; Test. of C. Stenson; Test. of W. Laxdal.

⁴⁸ Ex. N; Test. of G. Anderson.

49. Despite the instruction of the MN-OSHA Field Compliance Manual that the “case file shall contain documentation which refutes the more common [affirmative] defenses,” including the affirmative defense of unpreventable employee misconduct, the case file does not include documentation that addresses these defenses.⁴⁹

50. On July 14, 2006, MN-OHSA issued the Citations and Notification of Penalty.⁵⁰

51. On July 26, 2006, Michels filed a Notice of Contest.⁵¹

52. On October 23, 2006, MN-OHSA served and filed a Summons and Notice to Michels.⁵²

53. On November 10, 2006, Michels answered the MN-OHSA’s Complaint, asserting, in part, that the violations were due to unpreventable employee misconduct.⁵³

Procedural History:

54. Michels raised its claim as to the insufficiency of process in its Answer to the Complaint and, two days before the evidentiary hearing, requested an opportunity to be heard on this claim.⁵⁴

55. Under the terms of the First Pre-Hearing Order in this matter, the undersigned established a deadline for submissions of dispositive motions of April 30, 2009.⁵⁵

56. At the opening of the evidentiary hearing, Michels moved for a recommendation that the citations be dismissed on the grounds of improper service of the Summonses and Complaints and for laches. The Administrative Law Judge took Michels’ motions under advisement.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

⁴⁹ Compare, Ex. O at V-3 and V-4.

⁵⁰ Ex. N.

⁵¹ Ex. S.

⁵² *Id.*

⁵³ Ex. R.

⁵⁴ See, Electronic Mail Message of Aaron A Dean, *Sviggum v. Michels Pipeline Constr.*, OAH Docket No. 8-1901-20212-2 (May 19, 2009).

⁵⁵ First Pre-Hearing Order, *Sviggum v. Michels Pipeline Constr.*, OAH Docket No. 8-1901-20212-2.

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 182.664.

2. The Department gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements.

3. The Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. Minn. Stat. § 182.653, subd. 3, requires employers to comply with Occupational Safety and Health Standards adopted pursuant to Minn. Stat. Ch. 182.

5. 29 C.F.R. § 1926.651(k) requires that:

(1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

(2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

6. 29 C.F.R. § 1926.652 (a)(1) requires that:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) excavations are made entirely in stable rock, or

(ii) excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of potential cave-ins.

7. The Department has the burden of establishing an Occupational Health and Safety Act violation by a preponderance of the evidence.

8. The Department has established by a preponderance of the evidence that Michels' employees were exposed to the cited hazards.

9. The Department has proved a violation of 29 C.F.R. § 1926.651 (k)(2) and a violation of 29 C.F.R. § 1926.652 (a)(1).

10. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer and the history of previous violations.

11. The record supports the Department's penalty calculation regarding the severity and probability of harm of each violation. The penalty calculations and application of various credits in Citations J8947 and U7336 were in accordance with the MN-OSHA Field Compliance Manual and the Citation Rating Guide.⁵⁶

12. Respondent carries the burden of proof as to affirmative defenses excusing liability under 29 C.F.R. § 1926 and Minn. Rules 1400.7300, subp. 5 (2007).

13. The evidence in this record establishes that Michels: (a) established a work rule to prevent the reckless behavior and unsafe trench safety practice from occurring;⁵⁷ (b) adequately communicated the rule to its employees through a pyramiding series of written and oral training materials;⁵⁸ (c) took steps to discover incidents of noncompliance through unannounced investigations;⁵⁹ and (d) effectively enforced the rule through progressive discipline whenever employees transgressed it.⁶⁰

14. Because the misconduct at issue could not be controlled through the exercise of reasonable diligence, Michels is entitled to application of the employee misconduct defense and a dismissal of the Citations.

15. Any Finding of Fact that is more properly characterized as a Conclusion is hereby adopted as such and incorporated by reference.

⁵⁶ See, Ex. O at VI-21 and VI-24; Test. of L. Sperling; Test. of G. Anderson.

⁵⁷ Exs. 11 and 30.

⁵⁸ Exs. 29 – 42, 44 – 47 and 57; Test. of R. Halfmann; Test. of W. Laxdal; Test. of C. Stenson.

⁵⁹ Exs. 26 and 53; Testimony of John Restad; Test. of R. Halfmann; Test. of W. Laxdal; Test. of G. Witt.

⁶⁰ Exs. 21 – 24 and 49; Testimony of Craig Beckstrand; Test. of R. Halfmann; Test. of W. Laxdal; Test. of C. Stenson.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. Michels' Motion for Summary Disposition is DENIED.
2. Michels has established its entitlement to application of the employee misconduct defense and so is entitled to a judgment in its favor.
3. The Complaints in Docket Numbers 8389 and 8640 are DISMISSED.

Dated: July 21, 2009.

/s/ Eric L. Lipman

ERIC L. LIPMAN

Administrative Law Judge

Reported: Digital Recording
No transcript prepared

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subd. 3, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for this appeal are set out at Minn. Rules 5215.5000 to 5215.5210.

MEMORANDUM

Michels moved for summary disposition on its claim that the Complaints in this matter were not properly served and that they are otherwise barred by the equitable doctrine of laches.

In the alternative, Michels asserts that it is entitled to dismissal of the Complaints because the regulatory violations followed from unpreventable employee misconduct.

I. Laches

Summary disposition is the administrative equivalent of summary judgment.⁶¹ Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case and one party necessarily prevails when the law is applied to those undisputed facts.⁶²

The equitable doctrine of laches is available to prevent one who has not been diligent in asserting known rights from later recovering against a party who is prejudiced by the delay in asserting claims for recovery.⁶³ The state courts employ a four-factor test when assessing the defense of laches. The courts consider: (1) the nature of the action and the availability of defenses to the asserted claims; (2) the reasons for the delay in asserting claims for recovery; (3) prejudice to the defending party; and (4) policy implications that might follow from either permitting or barring the claims.⁶⁴ Laches is a doctrine that promotes a peaceful society by discouraging the assertion of stale claims for relief.⁶⁵

In this case, following the issuance of the two Citations, prompt Notice of Contests in each instance, and follow-on Complaints and Answers to each matter, there was a long, 27-month lag between the filing of Michels' Answer as to Docket 8640 and the Department's issuance of a Notice and Order for Hearing for a contested case. So says the Department, this was a case that "fell through the cracks."

While the policy of preventing the assertion of stale claims is a strong one, the dispute over the proper trench safety practice was initiated at an early point by MN-OSHA, continued to be the subject of communications between the parties and never

⁶¹ See, *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

⁶² See, *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

⁶³ *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (quoting *Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953)); *Harr v. City of Edina*, 541 N.W.2d 603, 606 (Minn. App. 1996) (quoting *Fetsch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952)).

⁶⁴ *M.A.D. v. P.R.*, 277 N.W.2d 27, 29 (Minn. 1979).

⁶⁵ *Id.*

was abandoned by the agency.⁶⁶ Michels was in a position to preserve its defenses and evidence for a later hearing, and was not unduly prejudiced by MN-OSHA's admittedly slow progress in settling this matter for a contested case hearing.

Second, and likewise problematic for Michels, the doctrine of laches has ordinarily been applied against state agencies only in those cases where the agency – like a private party in the marketplace – was acting in a proprietary capacity. Indeed, in *Leisure Hills v. Minnesota Department of Human Services*,⁶⁷ the Minnesota Court of Appeals held that the doctrine of laches was not available to prevent the Department of Human Services from recouping payments that an earlier government audit noted were then due and owing. As the Court reasoned, when administering the Medical Assistance program – which included efforts to recoup payments from health care providers – the agency was undertaking functions in the state's sovereign capacity. In such circumstances, the defense of laches does not lie.⁶⁸

While it is true that the Department and its counsel have duties to enforce the workplace safety laws,⁶⁹ MN-OSHA, when making demands for the payment of assessed penalties is not pursuing payments for its own account. Instead, MN-OSHA's demands arise out of a regulatory enforcement role. Because MN-OSHA is performing a governmental function when making claims that, under the Minnesota Occupational Safety and Health Act of 1973, Michels did not provide a work place that was “free from recognized hazards that are causing or are likely to cause death or serious injury or harm to its employees,”⁷⁰ the holding in *Leisure Hills* prevents application of the doctrine of laches. Michels is not entitled to summary disposition on this defense to the agency's claims.

II. Insufficient Service of Process

Michels asserts that it is entitled to dismissal because there was insufficient service of process by MN-OSHA of the Complaints in these matters. Instead, Michels argues that, at best, counsel for Michels received copies of the Complaints – and that the lawyers were not authorized by the company to receive the service of process.

Two points deserve special emphasis. First, Michels' Safety Director's testimony as to the receipt of the Complaints in Dockets No. 8389 and 8640 is more oblique than the argument of counsel. Mr. Witt testified that he did receive a copy of the Complaints

⁶⁶ Exs. K, M, N, R, and S.

⁶⁷ *Leisure Hills v. Minnesota Department of Human Services*, 480 N.W.2d 149 (Minn. App. 1992).

⁶⁸ *Id.* at 151; *see also*, *State v. Brooks*, 236 N.W. 316, 317 (Minn. 1931) (“The collection of taxes is a governmental or sovereign function of the state, and procrastination or delay on the part of its officers in the discharge of such function is not permitted to prejudice the state's right”); *In the Matter of Steve Sviggum, Comm’r, Dep’t of Labor and Industry, v. John Richardson*, OAH Docket No. 3-1900-17862-2 (2007) (<http://www.oah.state.mn.us/aljBase/190017862%20sd%20ord.htm>).

⁶⁹ Digital Recording, Preliminary Matters, 1st Day of the Evidentiary Hearing; Test. of G. Witt.

⁷⁰ Minn. Stat. § 182.653 (2) (2008).

at some time; he is not certain when this occurred; but did attend the informal conferences in these matters. This testimony does not discount or disprove MN-OSHA's claim that Michels received timely service as averred in the Department's affidavits of service.⁷¹

More importantly, to the extent that Michels' motion calls into question the power of the tribunal to undertake a contested case in the first instance,⁷² it makes a dispositive motion. Under the terms of the March 5, 2009 Pre-Hearing Order, "any dispositive motion" was due to be filed by 4:30 p.m. on Thursday, April 30, 2009. The facts underlying its claim on the failure of service were known to Michels before April 30, 2009 but were not detailed by way of written motion filed on or before that date. Accordingly, any claim that it was entitled to relief as a matter of law, was waived when it was not asserted by a written motion filed by the close of business on April 30, 2009.⁷³

II. Employee Misconduct Defense

A "serious violation" of state work safety standards is the:

violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.⁷⁴

As set forth in the statute, an employer is shielded from liability for workplace safety violations, when it: (a) had an established work rule to prevent unsafe trench repair practice from occurring; (b) adequately communicated the rule to its employees; (c) took steps to discover incidents of noncompliance; and (d) effectively enforced the safety rule when violations were discovered.⁷⁵ Moreover, while the scrutiny given to such a defense is more rigorous when supervisory employees are on the job site at the

⁷¹ *Compare*, Affidavit of Carrie Rohling (February 17, 2006) and Affidavit of Shana Sieben (October 23, 2006); *with* Test. of G. Witt.

⁷² *Compare generally*, *Year 2001 Budget Appeal of Landgren v. Pipestone County Bd. of Com'rs*, 633 N.W.2d 875, 878-79 (Minn. App. 2001) ("timely service on adverse parties has long been jurisdictional ... [t]herefore if service of process is invalid, the district court lacks jurisdiction to consider the case, and it is properly dismissed") (citing cases); *accord*, *Lewis v. Contracting Northwest, Inc.*, 413 N.W.2d 154, 257 (Minn. App. 1987) ("Defects in service of process are jurisdictional in nature").

⁷³ *Compare*, Minn. R. 1400.5500 (J) (2007).

⁷⁴ Minn. Stat. § 182.651 (12) (2008).

⁷⁵ *See*, *Horne Plumbing & Heating Co.*, 528 F.2d 564, 568-71 (5th Cir. 1976); *Secretary of Labor v. Stark Excavation, Inc.*, OSHRC Docket No. 07-1861 (Occupational Safety and Health Rev. Comm'n, 2008) (http://www.oshrc.gov/decisions/html_2008/07-1861.htm).

time of the violation, the presence (or even involvement) of supervisory staff during the misconduct is not an automatic bar to assertion of the defense.⁷⁶

In this case, Michels does not dispute that its employees violated the applicable trench safety standards on October 17, 2005 and June 13, 2006; rather, it argues that it should not be held accountable because the violation resulted from idiosyncratic employee conduct that it could not control through the exercise of reasonable diligence.

The evidence in this record establishes that Michels: (1) has a work rule to prevent unsafe trench repair practice from occurring; (2) adequately communicated this rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rule when violations were discovered.

It is worth noting that Michels' contention that, notwithstanding its internal program of safety inspections, the only violations of applicable trench safety practice of which it has ever been made aware are the ones that were discovered by MN-OSHA inspectors on October 17, 2005 and June 13, 2006,⁷⁷ invites genuine skepticism. Yet, in view of the record as a whole, Michels has even established the third prong of the applicable four-factor test. This conclusion, however, is a very close call; and one which, in the final analysis, turns upon a careful assessment of the credibility of the witnesses who testified at the evidentiary hearing and a close review of Michels' business records.⁷⁸

Because the misconduct at issue could not be controlled through the exercise of reasonable diligence, Michels is entitled to application of the employee misconduct defense and a dismissal of the Citations.

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⁷⁶ *See, id.*

⁷⁷ Test. of J. Restad; Test. of G. Witt.

⁷⁸ Exs. 26 and 53; Test. of J. Restad; Test. of G. Witt.